

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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FOR MR. CHIEF JUSTICE MARTIN

1932 APR 11

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TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5470

48

CAFRTZ CONSTRUCTION CO., A CORPORATION,
APPELLANT,

vs.

ROBERT MUDRICK AND FREDY MUDRICK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 11, 1931.

PRINTED SEPTEMBER 9, 1931.

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5470

CAFRITZ CONSTRUCTION CO., A CORPORATION,
APPELLANT,

vs.

ROBERT MUDRICK AND FREDY MUDRICK,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5470.

CAFRTZ CONSTRUCTION Co., a Corporation, Appellant,

vs.

ROBERT MUDRICK and FREDY MUDRICK.

a Supreme Court of the District of Columbia.

At Law.

No. 79156.

CAFRTZ CONSTRUCTION Co., a Corporation, Plaintiff,

vs.

ROBERT MUDRICK and FREDY MUDRICK, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 79156.

CAFRTZ CONSTRUCTION Co., a Corporation, Plaintiff,

vs.

ROBERT MUDRICK and FREDY MUDRICK, Defendants.

Memorandum.

January 24, 1931.—Declaration filed.

Supreme Court of the District of Columbia.

Tuesday, April 28, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, Joseph W. Cox, James M. Proctor, Justices, presiding.

* * * * *

Upon consideration of the motion filed herein for leave to file an amended declaration and substituted affidavit of merit it is ordered that said motion be and the same is hereby granted with leave to file the same within ten days hereof.

BAILEY,
Justice.

2

Amended Declaration.

Filed May 8, 1931.

* * * * *

First Count.

The plaintiff, Cafritz Construction Co., a corporation, sues the defendants, Robert Mudrick and Fredy Mudrick, for that heretofore, to wit, on February 14, 1930, the defendants jointly and severally executed, acknowledged and delivered to Arthur J. Bridgett and Milton Strasburger, as Trustees, a second deed of trust upon certain land and premises in the District of Columbia, known as Lot 83 in Square 3207 in Morris Cafritz's subdivision of part of Lot 1, Block 29, Brightwood Park, improved by premises No. 503 Kennedy Street, Northwest; that of even date with said deed of trust, described therein and secured thereby, the said defendants made, executed and delivered to Morris Cafritz their two certain joint and several promissory notes, dated February 14, 1930, No. 1 of 2 being for the sum of \$3,500.00, with interest at the rate of seven per cent per annum, payable to the order of Morris Cafritz in monthly installments of \$45.00 on the 14th day of each and every month until paid; and No. 2 of 2 being in the sum of \$1,000.00, with interest at the rate of seven per cent per annum, payable to the order of Morris Cafritz on or before one year after date; that said notes, for valuable consideration, before maturity and in the regular course of business,

3 were endorsed, transferred and delivered to the plaintiff corporation, which is the present owner and holder thereof; and that the rights of said Morris Cafritz under said deed of trust were, in writing, under seal, duly transferred and set over to the plaintiff. That true copies of each of said notes, with the endorsements on the back thereof, and a true copy of said assignment in

writing, and a true copy of said deed of trust, are set forth in the Bill of Particulars, hereto annexed and made part hereof. That the said deed of trust contained an acceleration clause which is fully set forth in the next Count of this declaration, and which clause is hereby referred to and made part of this Count. That each of said notes, on its face, in distinct terms identified and referred to said deed of trust securing the same. That pursuant to the terms of the said acceleration clause contained in said deed of trust, and after the sale of said parcel of land, the plaintiff elected that said promissory notes should immediately be and become due and payable, and so notified the defendants and each of them. That an installment of principal and interest on said note No. 1 did fall due under the terms thereof and under the said deed of trust, to wit, on March 14, 1930; thereafter several other installments fell due and remained totally unpaid at the time limited for the payment of the same. That demand was made for the payment of said notes, but the defendants failed and neglected to pay the same, and the same remained overdue and unpaid, and default did occur under the terms of said deed of trust. That thereafter, to wit, on May 18, 1930, the real estate mentioned and described in said deed of trust was duly sold at public auction by the Trustees named therein at and for the sum of \$2,150.00 over and above an existing first deed of trust for \$6,500.00; that interest on said first deed of trust amounted to \$192.83; that at the time of said sale there were certain accrued charges, and certain charges such as taxes, trustees' fees and auction expenses, all of which costs and charges are more particularly set out in the Bill of Particulars, hereto attached and made a part hereof; that the net amount received from the sale of said real estate was the sum of \$1,753.55, which has been duly credited on the notes aforesaid, leaving a balance due and unpaid of \$2,809.39.

4 That the total indebtedness of the defendants to the plaintiff, by reason of said promissory notes and deed of trust, and by reason of the deficiency arising from the sale of said land, is the sum of \$2,809.39.

Wherefore the plaintiff sues the defendant and claims the said sum of \$2,809.39, with interest from May 18, 1930, besides costs.

Second Count.

And the plaintiff sues the defendants for that heretofore, to wit, on February 14, 1930, the said defendants purchased from the plaintiff's assignor, Morris Cafritz, a certain parcel of real estate, hereinafter described, and in consideration thereof, became indebted to said Morris Cafritz for deferred purchase money in the sum of \$4,500.00; and being so indebted, the defendants jointly and severally signed, sealed and delivered a certain paper-writing in the form of a deed of trust, and did thereby and therein acknowledge themselves as being justly indebted unto the said Morris Cafritz in the full sum of \$4,500.00, represented by their joint and several promissory notes, bearing date February 14, 1930, note No. 1 being for \$3,500.00, with interest at seven per cent per annum, payable to the order of Morris Cafritz in monthly installments of \$45.00 on the 14th day of each and every month until paid, and note No. 2 being in the sum of \$1,000.00, with interest at the rate of seven per cent per annum, payable to the order of Morris Cafritz on or before one year after date;

5 and by said deed of trust said defendants did convey unto Arthur J. Bridgett and Milton Strasburger, as Trustees, the land and premises in the District of Columbia known as Lot 83 in Square 3207 in Morris Cafritz's subdivision of part of Lot 1, Block 29, Brightwood Park, improved by dwelling No. 503 Kennedy Street, Northwest, being the premises sold by the plaintiff's assignor to defendants as aforesaid. That note No. 1, on its face, contained the following words and figures, to wit:

"This is to certify that this is the note described in a Deed of Trust to the trustees named hereon, and bearing even date herewith, said Deed of Trust and note having been executed in my presence.

J. MILES MILLER,
Notary Public, D. C."

And also the following:

"Given as Deferred Purchase Money and Secured by Second Deed of Trust on Lot 83, Square 3207.

ARTHUR J. BRIDGETT AND
MILTON STRASBURGER,
Trustees."

And note No. 2, on its face, did contain a statement showing that it also was secured by the said deed of trust. True copies of said notes are annexed hereto as part of the Bill of Particulars, and are hereby referred to and made part of this declaration.

That said deed of trust contained a covenant in the words following, to wit:

“And upon this further trust, upon any default or failure being made in the payment of said notes or of any instalment of principal or interest thereon, when and as the same shall become due and payable, or upon default being made in the payment, after demand therefor, of any money advanced as herein provided for, or of any proper cost, charge, commission or expense in and about the
6 same, then and at any time thereafter the said parties of the second part or the survivors of them, or the trustees acting in the execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisements as the parties of the second part, or the survivors of them or the trustee acting in the execution of this trust, shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales:

Firstly, to pay all proper costs, charges and expenses, including all fees and costs herein provided for, and all monies advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales;

Secondly, to pay whatever may then remain unpaid of said notes, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said notes shall, upon such sale being made before the maturity of said notes, be and become immediately due and payable at the election of the holder thereof; and,

Lastly, to pay the remainder of said proceeds, if any there be, to said parties of the first part, or their assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.”

That the payee named in said promissory notes, namely, Morris Cafritz, for valuable consideration, before maturity and in the regular course of business, did endorse his name on the back of each of said notes and did transfer and deliver the same to the plaintiff corporation, which is
7 the legal owner and holder of said notes and each of them. And that the said Morris Cafritz did by his instrument in writing, under seal, transfer and assign to the plaintiff all of his right, title and interest in and to said notes, and in and to the security afforded by said deed of trust, a true copy of said assignment being set forth in the Bill of Particulars hereto annexed and made part hereof. And the plaintiff avers that an instalment of principal and interest on said Note No. 1 did fall due under the terms thereof, to wit, on March 14, 1930, and several instalments on said note did thereafter fall due, and all of said instalments remained totally unpaid at the time limited for the payment thereof; and thereafter, because of such defaults in the payment of said installments, the said Trustees, at the request of the plaintiff, to wit, on May 19, 1930, did offer the said property for sale, and did sell the same to the highest bidder at and for the sum of \$2,-150.00 over and above an existing first trust against said property; and for that the said plaintiff, pursuant to the acceleration clause contained in said deed of trust, did elect that the indebtedness represented by said two promissory notes should become due and payable, and did so notify the defendants and each of them. And the said Trustees, after deducting from the proceeds of said sale as aforesaid, the expenses of said sale, the amount of taxes due upon said property, had remaining in their hands the sum of \$1,-753.55, and paid the said sum of this plaintiff on account of the principal of said indebtedness, leaving a balance due said plaintiff by the defendants the sum of \$2,809.39, which said sum is now due and payable by the defendants to the plaintiff.

And the plaintiff claims of and from the said defendants the sum of \$2,809.39, with interest thereon from May 18, 1930, according to the Bill of Particulars, hereto annexed and made part hereof, besides costs of this suit.

MILTON STRASBURGER,
Attorney for Plaintiff.

7a *Substituted Affidavit of Merit.*

* * * * * *

DISTRICT OF COLUMBIA, ss:

J. Miles Miller, being first duly sworn, deposes and says that he is the agent for the plaintiff in the above-entitled case, wherein Robert Mudrick and Fredy Mudrick are named as defendants; that he is authorized to make this affidavit on behalf of the plaintiff, a corporation engaged in business and having an agent and office in the District of Columbia, and that the plaintiff is justly entitled to recover of the defendants, and of each of them, the full sum of \$2,809.39, with interest from May 18, 1930, and that its cause of action is based upon the following facts, to wit:

That heretofore, to wit, on February 14, 1930, at the City of Washington, District of Columbia, one Morris Cafritz sold and conveyed to the defendants as joint tenants, the following parcel of real estate in the District of Columbia, to wit:

“Lot 83 in Square 3207 in Morris Cafritz’ subdivision of part of Lot 1, Block 29, Brightwood Park, improved by premises No. 503 Kennedy Street, Northwest.”

And in consideration of the conveyance of said land, the defendants became jointly and severally indebted to said Morris Cafritz for deferred purchase money in the sum of \$4,500.00; that being so indebted as aforesaid, the defendants, jointly and severally, signed, sealed and delivered a certain paper-writing in the form of a deed of trust, and did thereby and therein acknowledge themselves as being justly indebted unto the said Morris Cafritz in the full sum of \$4,500.00, represented by their joint and several promissory notes, bearing date February 14, 1930, note No. 1 being for \$3,500.00, with interest at seven per cent per annum, payable to the order of Morris Cafritz in monthly

instalments of \$45.00 on the 14th day of each and every month until paid, and note No. 2 being in the sum of \$1,000.00, with interest at the rate of seven per cent per annum, payable to the order of Morris Cafritz on or before one year after date; that the said deed of trust bears the genuine signatures of the said defendants, and each of them, and that the two promissory notes secured by said deed of trust bear the genuine signatures of the defendants, and each of them; that by the deed of trust aforesaid the said defendants did convey unto Arthur J. Bridgett and Milton Strasburger, as Trustees, the land and premises aforesaid; said deed of trust containing a covenant in the words following, to wit:

8 “And upon this further trust, upon any default or failure being made in the payment of said notes or of any instalment of principal or interest thereon, when and as the same shall become due and payable, or upon default being made in the payment, after demand therefor, of any money advanced as herein provided for, or of any proper cost, charge, commission or expense in and about the same, then and at any time thereafter the said parties of the second part or the survivors of them, or the trustees acting in the execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisements as the parties of the second part, or the survivors of them or the trustee acting in the execution of this trust, shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales:

Firstly, to pay all proper costs, charges and expenses, including all fees and costs herein provided for, and all monies advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales;

Secondly, to pay whatever may then remain unpaid of said notes, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said notes shall, upon such sale being made before the maturity of said notes, be and become immediately due and payable at the election of the holder thereof; and,

Lastly, to pay the remainder of said proceeds, if any there be, to said parties of the first part, or their assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.”

That note No. 1 of said defendants, hereinbefore referred to, on its face, contained the following words and figures, to wit:

“This is to certify that this is the note described in a Deed of Trust to the trustees named hereon, and bearing even date herewith, said Deed of Trust and note having been executed in my presence.

J. MILES MILLER,
Notary Public, D. C.”

And also contained the following statement, to wit:

“Given as Deferred Purchase Money and Secured by Second Deed of Trust on Lot 83, Square 3207, Arthur J. Bridgett and Milton Strasburger, Trustees.”

9 Affiant further says that note No. 2, on its face, did also contain a statement showing that it was likewise secured by said deed of trust. True copies of said notes and of said deed of trust are hereto annexed as part of the Bill of Particulars, and are hereby referred to and made part of this affidavit.

Affiant further states that the payee named in said promissory notes, namely, Morris Cafritz, for valuable consideration, and in the regular course of business, did endorse his name on the back of each of said notes, and did transfer and deliver the same to the plaintiff corporation, which is the legal owner and holder of said notes and each of them; and that the said Morris Cafritz, by his instrument in writing, under seal, did transfer and assign unto the

plaintiff all of his right, title and interest in and to said notes, and in and to the security afforded by said deed of trust. A true copy of said assignment is set forth in the Bill of Particulars, and is hereby referred to and made part of this affidavit. That both of said notes bear the genuine endorsement of Morris Cafritz.

Affiant further says that an instalment of principal and interest on said note No. 1 fell due under the terms thereof to wit, on March 14, 1930, and that several additional instalments of said note did thereafter fall due, and that all of said instalments remained totally unpaid at the time limited by the terms of the note for the payment thereof; and thereafter, because of such defaults in the payment of said instalments, the said Trustees, at the request of the plaintiff, to wit, on May 19, 1930, did offer the said property for sale subject to a first deed of trust, and did sell the same to the highest bidder at and for the sum of \$2,150.00 over and above said trust; that the said plaintiff, after the sale aforesaid and pursuant to the acceleration clause contained in said deed of trust, did elect that the indebtedness represented by said two promissory notes should become due and payable, and did so notify the defendants and each of them. That the said Trustees, after deducting from the proceeds of said sale as aforesaid, the expenses incident to said sale, and the amount of taxes due upon said property, had remaining in their hands the sum of \$1,753.55, which amount the said Trustees delivered to the plaintiff on account of the principal of said indebtedness, leaving due said plaintiff by the defendants a balance of \$2,809.39, which amount is now due and payable by the defendants to the plaintiff. Affiant further says that a full and correct statement of the moneys received from the foreclosure aforesaid, and the expenses incident to such sale, is set forth as a part of the Bill of Particulars annexed to the Declaration, and said statement is hereby referred to and made part of this affidavit. The moneys received by the plaintiff from the said Trustees have been credited by the plaintiff as follows:

\$735.27 on account of note No. 1 of 2.

\$1018.28 on account of note No. 2 of 2.

Affiant further says that by reason of the premises, the plaintiff is justly entitled to recover of the defendants, and each of them, the sum of \$2,809.39, with interest from May

18, 1930, exclusive of all set-offs and just grounds of defense, according to the Bill of Particulars, hereto annexed and made part hereof.

J. MILES MILLER.

Subscribed and sworn to before me this 8 day of May, 1931.

[SEAL.]

DAVID J. HORNSTEIN,
Notary Public, D. C.

10

Bill of Particulars.

Robert Mudrick and Fredy Mudrick, Drs. to Cafritz Construction Co.

Sale of Lot 83 in Square 3207, in the District of Columbia.

5/19/30. By proceeds of sale of said real estate,		
less first trust		\$2,150.00
3/14/30. Amount due on second trust		
note No. 1 of 2	\$3,500.00	
Interest thereon to 5/19/30	44.66	
Amount due on second trust		
note No. 2 of 2	1,000.00	
Interest thereon to 5/19/30	18.28	
Interest on first trust	192.83	
Taxes	46.90	
Advertising	27.72	
Auctioneer's fee	21.50	
Trustees' Commission	107.50	
	\$4,959.39	\$2,150.00

Statement of Deficit.

To amount, being accrued charges and costs	\$4,959.39	
To amount, being proceeds of sale of said real estate, less first trust, as per statement above		\$2,150.00
To deficiency balance due Cafritz Construction Co., with interest from May 19, 1930, date of the sale		2,809.39
	\$4,959.39	\$4,959.39

MILTON STRASBURGER,
Atty. for Plff.

Deed of Trust Note—Installment.

Given as deferred purchase money for and secured by second deed of trust on Lot 83, Square 3207, Arthur J. Bridgett and Milton Strasburger, Trustees.

Subject to a first trust for \$6,500.00, dated November 21, 1927, at 6%, placed by B. F. Saul Company.

\$3,500.00. Washington, D. C. February 14, 1930.

For Value Received we, jointly and severally, promise to pay to the order of Morris Cafritz the sum of Thirty-five Hundred (\$3,500.00) dollars, with interest until paid at the rate of 7 per centum per annum.

Said principal and interest payable in monthly installments of Forty-five (\$45.00) dollars (with the privilege of making larger payments in any amount), on the 14th day of each and every month after date, until paid; each installment when so paid to be applied, first, to the payment of the interest on the amount of principal remaining unpaid, and the balance thereof credited to the principal.

(Signed)

ROBERT MUDRICK,

(Signed)

FREDY MUDRICK,

Address: 503 Kennedy St. N. W.

This is to certify that this is the note described in a Deed of Trust to the Trustees named hereon, and bearing even date herewith. Said Deed of Trust and note having been executed in my presence.

J. MILES MILLER,

Notary Public.

Note No. 1 of 2.

 Retain this note after payment that the Trustees may be satisfied as to its cancellation when a release is desired.

Payments on account of above note and interest are acknowledged as follows:

Date of Payment	Interest due	To principal	Balance principal due
1930.			
5, 19.			\$3,500.00
	Int. from 2/14/30		44.66
			3,544.66
6, 14.	By proceeds of sale held 5/19/30		735.27
			\$2,809.39

(The following appears on face of note:)

Default having been made under the deed of trust securing this note, the trustees have sold the property and the holder of this note has elected to treat this note as immediately due and payable, and the trustees have applied part of the proceeds of sale to the payment hereof.

11a [Endorsed:] Deed of Trust Note (installment).

Robert Mudrick et ux. \$3,500.00, payable \$45.00 per month on 14th day. Interest at 7%, to be deducted out of each monthly payment and balance thereof applied to principal. Without recourse to me. (Signed) Morris Cafritz. Without recourse to us. Cafritz Construction Co., by (Signed) Morris Cafritz, President.

12 Bill of Particulars (Cont'd).

Cafritz—Real Estate Investments.

Secured by Deed of Trust.

To Arthur J. Bridgett and Milton Strasburger, Trustees; Conveying Lot 83, Square 3207.

\$1,000.00. Washington, D. C., February 14, 1930.

On or before one (1) year after date, I promise to pay to the order of Morris Cafritz one thousand (\$1,000.00) dollars, for value received, with interest at seven per centum per annum until paid, payable semi-annually; each installment of interest to bear interest after maturity, if not then paid, at the rate aforesaid.

Payable at —.

No. 2 of 2.

ROBERT MUDRICK,
FREDY MUDRICK,
503 Kennedy Street N. W.

This is to certify that this is one of the promissory notes described in a certain deed of trust of even date herewith, to the Trustees named in the margin hereof.

J. MILES MILLER.

Registry No. —.

The following appears on face of note:

Default having been made under the deed of trust securing this note, the trustees have sold the property and the holder of this note has elected to treat this note as immediately due and payable, and the trustees have applied a portion of the purchase price to the payment of this note.

Retain this note after payment until release is obtained.

12a [Endorsed:] Robert Mudrick et ux \$1,000.00.
Due Feb. 14, 1931. 7%. (S. A. I. due Feb. 14, Aug. 14.) Without recourse to me. (Signed) Morris Cafritz.
Without recourse to us. Cafritz Construction Co., by (Signed) Morris Cafritz, President.

Payments.

Date.

6/14/30. By proceeds of trustees' sale\$1,018

CAFRITZ CONSTRUCTION —.,
By J. M. MILLER.

13 Bill of Particulars (Cont'd.).

This deed, made this 14th day of February, A. D. 1930 by and between Robert Mudrick and Fredy Mudrick, his wife, as joint tenants, of Washington, D. C., parties of the first part; and Arthur J. Bridgett and Milton Strasburger, of the same place, parties of the second part;

Whereas, Robert Mudrick and Fredy Mudrick are justly indebted unto Morris Cafritz in the full sum of Forty-five Hundred (\$4,500.00) Dollars for deferred payments of purchase money on the real estate hereinafter granted and conveyed, and for which amount they have executed and delivered and made payable to said Morris Cafritz their two certain, joint and several promissory notes, bearing even date with these presents, with interest at seven per cent. Note No. 1 of 2 being in and for the full sum of Thirty-five Hundred Dollars (\$3,500.00), said principal

and interest payable in monthly instalments of Forty-five Dollars (\$45.00) each, (with the privilege of making larger payments in any amount), on the 14th day of each and every month after date until the said amount is paid in full, first payment to be due and payable March 14, 1930, each instalment when so paid to be applied, first to the payment of the interest on the amount of principal remaining unpaid, and the balance thereof credited to the principal. Note No. 2 of 2 being in and for the full sum of One Thousand Dollars (\$1,000.00), with interest at seven per cent per annum, payable semi-annually, said note to become due and payable on or before one year after date.

And whereas the parties of the first part desire to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said parties of the second part or substituted trustee, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and of all money which may be advanced as provided herein, with interest on all such costs and advances from the date thereof.

Now, Therefore, This Indenture Witnesseth, that the parties of the first part, in consideration of the premises, and of one dollar, lawful money of the United
14 States of America, to them in hand paid by the parties of the second part, the receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, have granted and do hereby grant unto the said parties of the second part or the survivors of them, the following described land and premises, situate in the County of Washington, District of Columbia, known and distinguished as Lot numbered Eighty-three (83) in Square numbered Thirty-two Hundred and Seven (3207) in Morris Cafritz' subdivision of Lot numbered One (1) in Block numbered Twenty-nine (29), "Brightwood Park", as per plat recorded in the office of the Surveyor for the District of Columbia in Liber 87 at folio 112.

Subject to a first Deed of Trust of \$6,500.00, with interest at six per cent per annum, payable semi-annually, together with all the improvements in any wise appertain-

ing, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, into, or out of the said land and premises.

In and Upon the Trusts, Nevertheless, hereinafter declared; that is to say; in trust to permit said parties of the first part, their heirs or assigns to use and occupy the said described land and premises, and the rents, issues, and profits thereof to take, have and apply to and for their sole use and benefit, until default be made in the payment of said promissory notes hereby secured or any instalment of interest therein, when and as the same shall become due and payable, or any proper cost or expense in and about the same as hereinafter provided.

And upon the full payment of all the said notes and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, charges, commissions, half-commissions and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said parties of the first part, their heirs or assigns, at their cost.

15 And Upon This Further Trust, upon any default or failure being made in the payment of said notes or of any instalment of principal or interest thereon, when and as the same shall become due and payable, or upon default being made in the payment, after demand therefore, of any money advanced as herein provided for, or of any proper cost, charge, commission or expense in and about the same, then and at any time thereafter the said parties of the second part or the survivors of them, or the trustees acting in the execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisements as the parties of the second part, or the survivors of them or the trustee acting in the execution of this trust, shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales:

Firstly, to pay all proper costs, charges and expenses, including all fees and costs herein provided for, and all monies advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales; Secondly, to pay whatever may then remain unpaid of said promissory notes, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said note, be and become immediately due and payable at the election of the holder thereof; and, Lastly, to pay the remainder of said proceeds, if any there be, to said parties of the first part, their heirs or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

And the said parties of the first part do hereby agree at their own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid, to keep the said improvements insured against loss by fire in the full sum of Forty-five Hundred (\$4,500.00) dollars, in the name and to the satisfaction of the parties of the second part, or substituted trustee, in such fire insurance company or companies as the said parties of the second part may select, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both general and special, that may be assessed against, or become due on said land and premises during the continuance of this trust, and that upon any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expense thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.

And it is further agreed that if the said property shall be advertised for sale, as herein provided, and not sold, the trustee or trustees acting shall be entitled to one-half

the commission above provided, to be computed on the amount of the debt hereby secured.

And the said parties of the first part covenant that they will warrant specially the land and premises hereby conveyed, and that they will execute such further assurances of said land as may be requisite or necessary.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ROBERT MUDRICK. [SEAL.]

FREDY MUDRICK. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. MILES MILLER.

16 UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, *To wit:*

I, J. Miles Miller, a Notary Public in and for the District of Columbia, Do Hereby Certify that Robert Mudrick and Fredy Mudrick, parties to a certain Deed bearing date on the 14th day of February, 1930, and hereto annexed, personally appeared before me in said District the said Robert Mudrick and Fredy Mudrick, being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this 18th day of February, A. D. 1930.

J. MILES MILLER,
Notary Public, D. C.

[Endorsed:] Deed of Trust. Robert Mudrick et ux. to Arthur J. Bridgett and Milton Strasburger, Trustees. Received for Record on the 24th day of February, A. D. 1930, at 12:30 o'clock P. M., and recorded in Liber No. 6422, at folio 243, one of the Land Records for the District of Columbia, and examined by Arthur G. Froe, Recorder. Cafritz, Realtors, 14th and K, Washington, D. C. Main 9080.

17 Bill of Particulars (Cont'd.).

Know all men by these presents:

That I, Morris Cafritz, of Washington, D. C., for and in consideration of the sum of Ten Dollars to me in hand paid, receipt whereof is hereby acknowledge-, do hereby trans-

fer, set-over and assign to the Cafritz Construction Co., a corporation, its successors and assigns, all of my right, title and interest in and to two certain promissory notes signed by Robert Mudrick and Fredy Mudrick, bearing date February 14, 1930, No. 1 of 2 being for the sum of \$3,500.00, with interest at the rate of seven per cent per annum, payable to the order of Morris Cafritz in monthly installments of \$45.00 on the 14th day of each and every month until paid; and No. 2 of 2 being in the sum of \$1,000.00, with interest at the rate of seven per cent per annum payable to the order of Morris Cafritz on or before one year after date; said promissory notes being described in and secured by a certain second deed of trust from Robert Mudrick and Fredy Mudrick to Arthur J. Bridgett and Milton Strasburger, as Trustees, of even date, upon certain land and premises in the District of Columbia, known as Lot 83 in Square 3207 in Morris Cafritz's subdivision of part of Lot 1, Block 29, Brightwood Park, improved by premises No. 503 Kennedy Street, Northwest; said deed of trust being recorded February 24, 1930, in Liber No. 6422 at folio 243, one of the Land Records for the District of Columbia.

And I do hereby transfer, set-over and assign unto said Cafritz Construction Co. all of my right, title and interest in and to the deed of trust aforesaid, and to the security afforded thereby.

Witness my hand and seal this 6th day of January, 1931.

(Signed)

MORRIS CAFRITZ. [SEAL.]

Service of copy of the foregoing Amended Declaration, Bill of Particulars and Substituted Affidavit of Merit acknowledged this 7 day of May, 1931.

JACOB N. HALPER,

Attorney for Defendants.

18

General Demurrer.

Filed May 19, 1931.

* * * * *

Now come the defendants, by their attorney, and say that the amended declaration, and each count thereof, is bad in substance.

JACOB N. HALPER,

Attorney for the Defendants.

The matters of law advanced by the defendants in support of their demurrer follow:

1. Payment of a promissory note, which by its terms is payable in monthly installments, does not mature until time for payment has elapsed, unless maturity is accelerated by a provision in the note.

2. Where a debtor is indebted on more than one obligation and makes a voluntary payment, in the absence of agreement or an application of payments by either the debtor or the creditor, the law will apply payment to the oldest item or to the first maturing obligation.

3. Where the declaration on its face shows that the Court has not jurisdiction of the subject matter, the defect may be taken advantage of by demurrer.

4. The form of action is on a promissory note alone. It is not a species of action which permits a court of law to take cognizance of a proceeding like a suit in equity to foreclose a mortgage. Accordingly, the deed of trust cannot aid the acceleration of maturity of the promissory note nor impose upon the makers of the note an obligation to pay such items as interest on the first trust, taxes, advertising, auctioneer's fees, and the like. This is not an action on a personal decree for a deficiency awarded by a court of equity.

19 Milton Strasburger, Esq.,
Attorney for the plaintiff,
1518 K St. N. W.,
Washington, D. C.:

Please take notice that the above demurrer and points of law and authorities in support of the same will be filed in the clerk's office on the 19th day of May, 1931, and you are required to submit your points of law and authorities in opposition thereto within five days thereof as required by Rule 32.

JACOB N. HALPER,
Attorney for the Defendants.

Received copy of General Demurrer this 18th day of May, 1931.

MILTON STRASBURGER.
H. B.

20

Memorandum Opinion.

Filed May 25, 1931.

* * * * *

The demurrer to the first count of the amended declaration will be sustained on the authority of the decision of Justice Stafford in *Wilson v. Davis*, Law #78213.

The demurrer to the second Count will also be sustained, there being no promise in the deed of trust to pay any deficiency after foreclosure.

BAILEY, J.

Supreme Court of the District of Columbia.

Monday, May 25, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, James M. Proctor, Joseph W. Cox, presiding.

* * * * *

Upon consideration of the demurrer filed herein to the amended declaration it is ordered that said demurrer be and the same is hereby sustained.

BAILEY,
Justice.

Thursday, May 28, 1931.

Sessions resumed pursuant to adjournments, Hon. Jennings Bailey, Joseph W. Cox, James M. Proctor, Justices, presiding.

* * * * *

Comes now the plaintiff by its attorney of record and elects to stand upon its amended declaration herein
21 and it appearing that a demurrer to said amended declaration was sustained on the 25th day of May, 1931 judgment is ordered in accordance therewith.

Wherefore, it is considered that plaintiff take nothing by this action that defendants go hence without day be for nothing held and recover of plaintiff their costs of defense to be taxed by the clerk and have execution thereof.

To the foregoing judgment the plaintiff by its attorney of record notes an appeal, in open court, to the Court of Appeals of this District: whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

BAILEY,
Justice.

Memorandum.

June 3, 1931.—Undertaking on appeal (\$100.00) approved and filed.

Assignment of Errors.

Filed June 2, 1931.

* * * * *

Comes now the plaintiff, Cafritz Construction Co., and files the following assignment of errors:

The Court erred:

- (1) In sustaining defendants' demurrer.
- (2) In holding that the promissory notes of the defendants had not matured at the time of institution of suit.
- (3) In holding that the promissory notes and deed of trust should not be construed together as a single contract.
- 22 (4) In holding that the acceleration clause in the deed of trust did not for all purposes accelerate the promissory notes thereby secured.
- (5) In holding that the second count of the declaration did not set forth a good and sufficient cause of action against the defendants for an obligation matured at the time of the institution of suit.
- (6) In holding that the notes here sued upon are not affected by the acceleration clause of the trust deed, and that an action on the notes will not lie until by the face of the notes alone it can be determined that the notes have matured.
- (7) In dismissing this suit and entering final judgment in favor of the defendants.

MILTON STRASBURGER,
Attorney for Plaintiff.

Præcipe to Prepare Record on Appeal.

Filed June 9, 1931.

* * * * *

The Clerk of the Court will please prepare the record on appeal in the above-entitled case, and include therein the following:

(1) Order granting leave to file Amended Declaration (April 28, 1931).

(2) Amended Declaration and Bill of Particulars (May 8, 1931).

(3) Defendants' Demurrer (May 19, 1931).

(4) Memorandum Opinion of Court (Mr. Justice Bailey) (May 25, 1931).

(5) Order Sustaining Demurrer (May 25, 1931).

23 (6) Final Judgment (May 28, 1931).

(7) Notation of Appeal to Court of Appeals (May 28, 1931).

(8) Order fixing undertaking for costs on appeal (May 28, 1931).

(9) Memorandum as to filing of undertaking (June 3, 1931).

(10) Assignments of Error (June 2, 1931).

(11) This præcipe.

MILTON STRASBURGER,
Attorney for Plaintiff.

24 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 79156 at Law, wherein Cafritz Construction Co., a corporation, is Plaintiff and Robert Mudrick and Fredy Mudrick are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of August, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5470. Cafritz Construction Co., a corporation, appellant, vs. Robert Mudrick and Fredy Mudrick. Court of Appeals, District of Columbia. Filed Aug. 11, 1931. Henry W. Hodges, Clerk.

OCT 5 - 1931

Henry W. Hodges

CLERK

IN THE

Court of Appeals of The District of Columbia

CAFRITZ CONSTRUCTION CO.,
a corporation

Appellant,

vs.

ROBERT MUDRICK, et al.,
Appellees.

No. 5470

BRIEF ON BEHALF OF APPELLEES

JACOB N. HALPER,

Attorney for Appellees.

IN THE
Court of Appeals of The District of Columbia

CAFRITZ CONSTRUCTION CO.,
a corporation

Appellant,

vs.

ROBERT MUDRICK, et al.,
Appellees.

No. 5470

BRIEF ON BEHALF OF APPELLEES

The appellant's alleged cause of action is on two promissory notes. The first is for \$3,500, dated February 14, 1930, and is payable by monthly instalments of \$45. beginning 30 days after date. (R. p. 12) Suit having been filed on January 24, 1931, the principal amount of this note, in the absence of a provision in the note accelerating maturity, is not, by calculation, yet due. *Mansfield vs. Winter*, 10 App. D. C. 549.

The second note for \$1,000, dated February 14, 1930, is payable one year after date. According to the plaintiff's bill of particulars, (R. p. 11) the proceeds of the sale at auction under the deed of trust securing the payment of these notes amounted to \$2,150, suffi-

cient to pay the principal of the second note and the accrued payments on the first note. In the absence of an application of payment by either the debtor or the creditor, the creditor was bound to pay this first maturing obligation. In re *Hawkes*, 204 Fed. 309. The amount due at the time of suit being less than \$1000, the court was without jurisdiction. Act Enlarging the Jurisdiction of the Municipal Court, approved March 3, 1921, (41 Stat. L. pt. 1, p. 1310).

The notes and deed of trust are so separate and distinct, so far as they can be made the basis of an action at law, that the holder of the notes may exercise the option to foreclose the deed of trust in equity or sue at law on the notes, and these actions may be maintained concurrently. *Sis vs. Boarman*, 11 App. D. C. 116-127. But there is wanting authority for the doctrine that permits a so called action on a "deficiency" predicated on both instruments, so that maturity of payment of a promissory note payable by instalments may be accelerated by a provision in the deed of trust given to secure payment of the note.

The provision in the deed of trust accelerating maturity of the notes, is for the purpose of foreclosure only. Consider the provision: (R. p. 9)

Secondly, to pay whatever may then remain unpaid of said notes, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said notes shall, upon such sale being made before the maturity of said notes, be and become immediately due and payable at the election of the holder thereof;

The deed of trust provides that foreclosure may be had upon default in the payment of any instalment. (R. p. 8) In the absence of the above provision it

would be necessary to sell the security to satisfy one instalment, and after deducting the instalment and the usual charges, pay the balance to the grantor in the deed of trust. (R. p. 9) To avoid this situation and to better secure the holder of the note and thus permit application of all the proceeds of the sale to the payment of the note, the deed of trust provision accelerates maturity of payment for the purpose of sale and application of proceeds as above.

Another provision of the note relied on as associating the two instruments is as follows: (R. p. 9)

This is to certify that this is the note described in a Deed of Trust to the trustees named hereon, and bearing even date herewith, said Deed of Trust and note having been executed in my presence. J. Miles Miller, Notary Public

This Court has held that a mortgage securing a negotiable note passes with the assignment of the note. *Brewer vs. Slater*, 18 App. D. C. 48. That being so, the note should be identified in the hands of a subsequent holder so that the trustees in commencing foreclosure proceedings, applying the proceeds of sale to the note and in carrying out many other provisions of the deed of trust, may be satisfied that the note is the one entitled to the benefits of the deed of trust. But the above provision has no greater significance, and surely cannot be urged as effectively associating the acceleration provision of the deed of trust with the note.

The deed of trust imposes upon the grantors no obligation to pay a deficiency arising out of a sale at auction. Neither does it impose upon the grantors therein the obligation to pay interest on a senior mortgage on the same property, as claimed in the plaintiff's bill of

particulars. (R. p. 11)

If it were the intention of the parties to accelerate maturity of payment of the notes, would the draftsman of the deed of trust and notes—both carefully and formally drawn so as to meet all contingencies—omit the acceleration clause from the notes and leave the intent of the parties to be gathered from the deed of trust?

In the memorandum opinion of the Court below (R. p. 21) the case of *Wilson vs. Davis*, Law No. 78213, in which Mr. Justice Wendell P. Stafford wrote an exhaustive opinion, was relied on in sustaining the demurrer. In Justice Stafford's memorandum the case of *Railway Co. vs. Sprague*, 103 U. S. 756-761, is thought to definitely settle the question. In commenting on the case, Mr. Justice Stafford says:

This case although apparently in point and sufficiently to control our decision would seem to have been quite generally overlooked, perhaps because it is usually cited upon the question of the negotiability of bonds. Inasmuch as the whole field has been gone over, it has been thought worth while to state the result of the search and to show that in any event the same conclusion must be reached.

It is respectfully submitted that the Court below did not err in sustaining the demurrer, and the judgment below should be, accordingly, affirmed.

Respectfully submitted,

JACOB N. HALPER,

Attorney for Appellees.

